Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	
Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band	PR Docket No. 93-144 RM-8117, RM-8030; RM-8029
and	
Implementation of Section 309(j) of the Communications Act - Competitive Bidding 800 MHz SMR	PR Docket No. 93-253

CONSOLIDATED REPLY COMMENTS OF DRU JENKINSON, INC., JANA GREEN, INC. AND SHELLY CURTTRIGHT, INC.

In accordance with the Commission's Further Notice of Proposed Rule Making in the captioned proceedings, released November 4, 1994 (hereinafter "Further Notice"), and acting through telecommunications counsel, Dru Jenkinson, Inc., Jana Green, Inc. and Shelly Curttright, Inc. (collectively hereinafter "Licensees") hereby submit their consolidated reply comments.[1/] Licensees are small, female-owned enterprises that already hold 800 MHz Specialized Mobile Radio (hereinafter "SMR") licenses, as well as pending applications for additional such licenses.

[1/] These Reply Comments are timely filed pursuant to the Commission's Order, DA 95-67, released January 18, 1995.

I. THE COMMISSION MUST PROTECT LICENSES ISSUED PURSUANT TO THE PREVIOUSLY FROZEN APPLICATIONS

1. As the Commission well knows, effective August 9, 1994, it unofficially, temporarily suspended the processing of then pending applications for 800 MHz SMR licenses ("Pending Applications"). A number of these Pending Applications, including all of those filed by Licensees, have been on file since the fall of 1993. In November of 1994, however, the Commission decided to resume the processing of the Pending Applications.

2. Licensees' principal concern in this docket remains that any wide-area 800 MHz SMR licensing regime not disenfranchise licenses granted pursuant to the Pending Applications. To Licensees' knowledge, this point was not raised in initial comments by any of the major SMR industry groups, who collectively pressed for, and provided the assistance necessary to finally assure, the processing of the Pending Applications.

A. The Commission Committed To Processing The Pending Applications

3. The Commission's Wireless Telecommunications Bureau has publicly committed to "process the backlog of SMR applications that were pending" on August 9. See Exhibit 1. To retroactively strip the licenses resulting from those Pending Applications of incumbency protections under the proposed wide-area rules would be wholly inconsistent with the Commission's implicit commitment to process the Pending Applications and grant any licenses in accordance with the rules in effect at the time those Pending Applications were filed. Indeed, the applicants must not be

penalized in new rules for delays that were neither their responsibility nor their fault.

B. The Proposed Rules Unfairly Discriminate Against Licenses Granted Pursuant To The Pending Applications

4. To that end, the Commission must correct the unfair discrimination against licenses granted pursuant to the Pending Applications embodied in the following specific provisions of its proposed wide-area rules:[2/]

a. **Proposed Section 90.617(d)** states in part that "SMR licensees licensed on Channels 400-600 on or before August 9, 1994 may continue to utilize these frequencies within their existing service areas." (emphasis supplied). The clear implication is, of course, that a license granted after August 9, 1994 on these channels would, upon the effective date of the rules, be automatically denuded of the right to use these frequencies. The Commission must remedy this potential discrimination by changing the text of the rule to apply to "SMR licensees licensed on Channels 400-600 pursuant to applications on file as of August 9, 1994." Indeed, this would be

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[2/] Interestingly, the text of the Further Notice does not reflect that there would be distinction between licenses granted prior to August 9, 1994 and licenses granted pursuant to the Pending Applications on file as of that date. It may be that these distinctions were not intended since the Further Notice was released prior to the announcement of the Commission's decision to resume processing of the Pending Applications. In either case, the discriminatory provisions in the proposed wide-area rules must be rectified.

consistent with proposed Section 90.663(a)(1) which would require the MTA licensee to afford protection "to all previously-authorized co-channel stations that are not associated with another MTA licensee." (emphasis supplied).

b. **Proposed Section 90.629(e)** states that "SMR Systems licensed after August 9, 1994 will not be eligible for extended implementation periods under this section." (emphasis supplied). This provision would effectively deny (on a retroactive basis) the existing "slow-growth" option to licenses whose issuance was delayed solely because of the Commission's unofficial processing freeze. This provision would detrimentally affect a number of requests for slow-growth authority which Licensees understand to be currently on file.[3/] Again, such a retroactive application of this rule is unwarranted, unfair, and legally questionable. The rule should be modified to state that "SMR Systems encompassing transmitter locations granted pursuant to applications filed after August 9, 1994 will not be eligible for extended implementation periods under this section." (emphasis supplied).

[3/] These include a "slow-growth" request filed on behalf of the Licensees.

c. **Proposed Section 90.677** states, in relevant part, that "[a]n SMR licensee initially authorized on any of the channels listed in Table 4A of Section 90.617 on or before August 9, 1994 may transfer or assign its channel(s) to another entity subject to the provisions of Section 90.153 and 90.609(b)." (emphasis supplied). Again, this language appears to single out for retroactive and discriminatory treatment licenses granted pursuant to the Pending Applications. The licensees of these facilities should not be deprived unreasonably of the protections afforded other incumbents. The language must be clarified to include, "licenses granted pursuant to applications filed on or before August 9, 1994."

II. THE RETROACTIVE DISTINCTIONS FOR PENDING APPLICATIONS ARE LEGALLY SUSPECT

5. Retroactive application of agency regulations is disfavored where it would have the impact projected hereinabove.

> "Retroactive application of policy is disfavored when the ill effects of such application will outweigh the need of immediate application...or when the hardship on affected parties will outweigh the public ends to be accomplished."

Iowa Power and Light Company v. Burlington Northern, Inc., 647 F.2d 796, 812 (8th Cir. 1981), cert. den., 455 U.S. 907 (1982).

6. The United States Court of Appeals for the District of Columbia Circuit has stated that the relevant factors in determining whether regulatory retroactivity is permitted include "the degree of retroactivity, the need for administrative flexibility and the hardship on the affected parties." Tennessee Gas Pipeline Company v. Federal Energy Regulatory Commission, 606 F.2d 1094, 1116, n. 77 (1979), cert. den., 445 U.S. 920 (1980); *see*, Summit Nursing Home, Inc. v. U.S., 572 F.2d 737, 743 (Ct. Cl. 1978). (Court must compare the public interest in the retroactive rule with the private interests that are overturned by it).

7. Here the Licensees have spent very significant sums of money on engineering, frequency coordination and application fees, not to mention their own uncompensated time and energy. The majority of the Pending Applications of the Licensees are in smaller markets or more rural areas of the country. The major market frequencies are already controlled by the larger SMR providers. To deprive the licenses resulting from these applications of incumbency protections, at the hands of prospective MTA licensees, would effectively render the efforts of the Licensees meaningless.

8. Furthermore, retroactive changes in the SMR licensing rules, which would effectively wipe out investments made in reliance upon the rules in effect at the time the Pending Applications were filed, are prohibited by general principles of administrative law. The U.S. Supreme Court has held that retroactivity in formal rulemaking proceedings is inherently

suspect. Bowen v. Georgetown University Hospital, 488 U.S. 203 (1988). *See also*, Health Insurance Association of America, Inc. v. Donna E. Shalala, No. 92-5196 (May 13, 1994). Retroactive application of a rule requires specific statutory authority for such retroactivity. Bowen, *supra*, at 213. Nothing in either the Communications Act or the Administrative Procedure Act would support a formulation of these wide-area rules to retroactively strip licenses granted pursuant to the Pending Applications of incumbency protections.[4/] As the Supreme Court noted in Bowen:

> It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.

Id., at 208. There is no specific authority, either in Section 303(r) of the Act, 47 U.S.C. § 303(r), governing rulemaking powers, nor in the radio licensing provisions applicable to SMR licenses, Sections 307 to 309 and Section 332, 47 U.S.C. §§ 307-309, 332, to

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[4/] In Maxcell Telecom Plus, Inc. v. F.C.C., 815, F2d 1251 (D.C. Cir. 1987), which was decided before Bowen, the D.C. Circuit was able to discern sufficient Congressional intent in the adoption of the lottery statute, 47 U.S.C. § 309(i), to justify retroactive imposition of the lottery procedures for selection of cellular telephone applicants that had originally been filed in anticipation of comparative hearings. 815 F.2d at 1555. This is a limited exception because of the specific Congressional intent to employ lottery procedures to eliminate mutually-exclusive application backlogs, *inter alia*. Id. Moreover, there was no imposition of any obligation or liability nor the deprivation of any rights as a result of the change from comparative hearing to lottery selection procedures. By contrast, the Licensees have incurred substantial costs in preparation of applications that could be granted on a first-come, first-served basis under rules in effect at the time they were filed. There was no expectation that those costs would be rendered worthless by failing to protect licenses issued from subsequently granted MTA-based licenses.

justify the retroactive discrimination against applicants that have filed their applications based upon an expectation of protection from entities licensed under a completely new set of wide-area rules implemented years after their applications were filed.

9. In addition, such retroactive application of rules is specifically prohibited by the Administrative Procedure Act. The APA specifically defines a "rule" as an agency statement "of general or particular applicability *and future effect*." 5 U.S.C. § 551(4) (emphasis supplied). *See also* Bowen, supra, 488 U.S. at 218 (J. Scalia Concurring). GN Docket 93-252 is by definition a notice and comment rulemaking proceeding. Thus, retroactive changes in the rules depriving licenses granted pursuant to the Pending Applications from incumbency protections would amount to what Justice Scalia characterized as "secondary retroactivity", *i.e.*, "altering future regulation in a manner that makes worthless substantial past investment incurred in reliance upon the prior rule..." Id., 488 U.S. at 220 (J. Scalia Concurring). Retroactive application of rule changes strip the Pending Applications of incumbency protections; thereby imposing a substantial regulatory burden, with attendant financial costs, upon parties who had made financial decisions in reliance upon FCC rules and policies in effect when their Pending Applications were filed. Such retroactivity is prohibited by the APA.

III. THE COMMISSION MUST BE CONCERNED ABOUT FAIRNESS TO SMALL ENTERPRISES

10. The Commission has conceded that its wide-area auction proposal for 800 MHz SMR will "potentially affect numerous small entities already operating 800 MHz SMR systems on frequencies designated for licensing on a wide-area basis." Further Notice, Appendix B, Page 2. The proposal, the Commission admits, also could affect "small entities seeking initial licenses in the 800 MHz SMR service." Id. The Commission cannot further exacerbate this problem by denying incumbency protections to entities like Licensees who are small enterprises that filed their Pending Applications nearly a year and a half ago in good faith reliance on the existing rules, only to be later caught by an unannounced processing freeze imposed solely to purportedly address an application backlog. This form of regulatory "sleight of hand" is blatantly inconsistent with the Commission's recent decision to process the Pending Applications. A regulatory system for licensing wide-area SMR systems that includes such disparately discriminatory distinctions based solely on the August 9 date cannot be implemented.

IV. KEY CONGRESSIONAL FIGURES HAVE EXPRESSED SIMILAR CONCERNS ABOUT THE IMPACT ON SMALL ENTERPRISES

11. Licensees note that concerns over small businesses potentially affected by a wide-area scheme have generated legitimate inquiry from the leadership of the U.S. Senate Committee on Commerce about the entire scheme to auction 800 MHz SMR spectrum. See Exhibit 2. In their Initial Comments, Licensees

supported the concept of a wide-area SMR licensing process, so long as the interests of small entities could be adequately protected, especially those who long ago had sought a modest stake in the SMR industry. Licensees' support is consistent with the concerns raised by the Senate leadership. The proposal to "distinguish" between licenses granted before August 9 and licenses resulting from and applications on file as of that date can only serve to buttress those concerns.

V. CONCLUSION

12. The Commission must afford licenses granted pursuant to the Pending Applications which were on file prior to August 9, 1994, the same incumbency protections proposed for the licenses granted prior to the August 9, 1994 date. To do otherwise imposes unfair and unjustified disparate regulatory treatment which is arbitrary and capricious.

Respectfully submitted,

DRU JENKINSON, INC.
JANA GREEN, INC.
SHELLY CURTTRIGHT, INC.

By: _____

Paul C. Besozzi, Esquire
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Date: February 10, 1995

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EXHIBIT 1

Federal Communications Commission
Washington, D.C. 20554

DEC 2 8 1994

In Reply Refer To:
7330-03/1700A3

Honorable Dianne Feinstein
United States Senator
1700 Montgomery Street
Suite 305
San Francisco, California 94111

Dear Senator Feinstein:

Thank you for your letter of October 17, 1994, enclosing a letter from the law firm of Besozzi, Gavin & Craven, which represents one of your constituents, Mr. Scott Mayer, concerning the Commission's freeze on new applications and suspension of processing of pending applications for 800 MHz Specialized Mobile Radio (SMR) systems.

The freeze on new SMR applications, other than SMR applications for General Category channels, remains in effect pending the Commission's adoption of new rules for licensing of 800 MHz SMR systems. Maintaining the freeze on filing of new applications is key to ensuring an orderly transition to a form of licensing that better takes into account the competitive realities of today's market for commercial mobile services.

The Commission has announced, however, that it will process the backlog of SMR applications that were pending at the time the freeze was imposed, with the assistance of computer software provided by a coalition of SMR industry representatives. Attached is a copy of the News Release announcing this decision. The software will enable the Commission to process the backlog far more efficiently than would have occurred under the procedures previously in effect and at a significantly reduced cost to the taxpayer. Processing will begin within the month after testing of the computer software is completed.

I hope this is responsive to your constituent's inquiry.

Sincerely,

Regina M. Keeney

Regina M. Keeney
Chief, Wireless Telecommunications Bureau

Enclosure

EXHIBIT 2

United States Senate

WASHINGTON, DC 20510

January 17, 1995

The Honorable Reed E. Hundt
Chairman
Federal Communications Commission
Room 814
1919 M Street, N.W.
Washington, D.C. 20554

Dear Chairman Hundt:

We have received inquiries from small businesses in our states regarding the FCC's proposal in PR Docket No. 93-144 to authorize and auction new wide-area 800 MHZ Specialized Mobile Radio (SMR) systems. In order to help us respond to the concerns of our constituents, we request that you answer the following questions:

1. Given that each market in the nation already has two operating cellular systems and that the FCC will soon license three to six new PCS systems to serve each area, what evidence does the FCC have that an additional one to four new cellular-type SMR systems are needed in each Major Trading Area (MTA)?

2. Are auctions an appropriate licensing mechanism in a service such as 800 MHz SMR, which presently has hundreds of small business licensees, as well as tens of thousands of small business customers, occupying portions of the channels proposed to be auctioned?

3. Why does the FCC's proposal prohibit incumbent SMR systems from expanding their existing service areas without the consent of the future MTA licensees? What are the FCC's estimates of the costs and hardships of this proposal to the small businesses which presently operate dispatch-type systems on 800 MHz SMR channels, and to the small businesses which are the primary customers of these systems?

4. What protections will the FCC adopt to prevent incumbent SMR operators from being driven off their existing channels by large, well-financed auction winners? For example, what procedures will the FCC adopt to prevent auction winners from constructing transmitting facilities that interfere with existing SMR systems, and from forcing existing licensees to bear the costs and delays of formal FCC proceedings (and existing customers to bear the loss of degradation of needed services) before such interference can be eliminated or reduced?

We look forward to hearing from you as soon as possible.

Sincerely,

CERTIFICATE OF SERVICE

I, Lisa Y. Taylor, a secretary in the law firm of Besozzi Gavin & Craven do hereby certify that a copy of the foregoing **"CONSOLIDATED REPLY COMMENTS OF DRU JENKINSON, INC., JANA GREEN, INC. AND SHELLY CURTTRIGHT, INC."** has been sent via hand delivery on this 10th day of February 1995, to the following:

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Washington, D.C. 20554

Honorable James H. Quello
Commissioner
Federal Communications Commission
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Honorable Andrew C. Barrett
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